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The first twenty cases under GATT Article XX; tuna or shrimp dear?

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1. Introduction

Twenty years have seen twenty cases appealed under the General Exceptions to Article XX at the WTO. In August 2014, the Appellate Body issued its twentieth such report in the *China- Rare Earths* case.² When the General Exceptions have been invoked under Article XX of the GATT,³ it has only been deemed a legitimate defence in two cases since the inception of the WTO and its Dispute Settlement Body (DSB) in 1995. The General Exceptions address the conflict between trade and other legitimate policy objectives of Members. There are ten such objectives including public morality, the protection of life and the conservation of exhaustible natural resources.

The aim of this paper is to analyse recent cases involving Article XX defences and whether a new interpretation of Article XX is needed in light of this low success rate of Article XX defences.⁴ Is this low success rate attributable to systemic reasons at the DSB or is it indicative of a priority being given to market access over public policy objectives? This paper considers this question and whether the Appellate Body is striking the right balance between Members' rights to market access and Members' rights to pursue public policy objectives under the General Exceptions.

Article XX allows the DSB to strike a balance between free trade and other public policy goals. The *Tuna/ Dolphin* and *Shrimp/ Turtle* cases are famous in the WTO lexicon and have become symbolic of the larger trade and the environment debate. In the former, it was felt that the Panel report shifted the balance in the trade and environment debate in favour of free trade. This balance was seemingly restored in the *Shrimp/Turtle* case in 2001 where a US measure protecting sea turtles was deemed compliant with the WTO Agreements. However, since 2001, no measure defended under Article XX has been deemed compliant with the WTO Agreements. In assessing whether a revised interpretation of Article XX is needed, this paper considers how well the Appellate Body is striking this balance.

The 2014 *EC-Seals*⁵ case illustrates recent developments under Article XX. Section 3 considers the interpretative evolution of Article XX in light of this case. In particular, the nature of Article XX's two-tier test, the "rational connection" test and the distinction between a measure and its application are considered.

The rest of the paper is structured as follows. Section 2 introduces Article XX and its two-tiered test for qualifying as a general exception. Section 3 looks at some of the issues raised under Article XX in the aftermath of *EC-Seals*. Section 4 examines why measures defended under the General Exceptions have infringed Article XX. Section 5 considers whether or not a revised interpretation of Article XX is needed given the low success rate for defences. Finally, section 6 concludes.

² D431, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*.

³ The General Exception Clause is also found under Article XIV of GATS, which has an identical wording. As the vast majority of cases in this area have been taken under the GATT, for the sake of simplicity the General Exceptions Clauses are referred to as being under GATT Article XX throughout this paper.

⁴ See Appendix 1 for a table showing the case-by-case success rate of Article XX defences.

⁵ DS401, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*.

2. Introducing the General Exceptions

When a government measure is found to restrict trade, Article XX may be invoked as a defence. A measure is analysed in two stages under Article XX in assessing whether it qualifies for protection. Firstly, it must be capable of being provisionally justified under one of the ten policy objectives contained in subparagraphs (a) – (j) of Article XX. Secondly, a measure must comply with Article XX's chapeau, or introductory clauses. The chapeau's primary purpose is prevention of abuse of the exceptions listed in the subparagraphs.⁶

It has been the traditional view at the DSB, that before turning to the chapeau, the Panel or Appellate Body must consider whether a measure is;

- (a) necessary to protect public morals
- (b) necessary to protect human, animal or plant life or health
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article XX (a), (b), (d) and (g) are the only subparagraphs that have formed the basis of cases that have come before the Appellate Body. Article XX(a), (b) and (g) concerns moral and environmental issues, which is where the focus of this paper lies. Article XX(d) is thematically different, dealing with measures necessary for compliance with laws in areas such as customs enforcement. For this reasons the content of these cases is not analysed in this paper.

In determining whether a measure is “necessary” under Article XX(a) and (b), the Appellate Body balances factors including the contribution of a policy to its objective, the importance of the objective and its impact on international trade.⁷ If confirmed as necessary preliminarily, the measure is then compared to less restrictive alternative measures. On whether a measure is “relating to the conservation of exhaustible natural resources” under Article XX(g), a “substantial relationship” must exist between the measure and the conservation effort.

To comply with the chapeau, *inter alia*, a measure must not be applied in a manner that constitutes “arbitrary or unjustifiable discrimination” or “a disguised restriction on international trade”. It is a flexible tool provided by the Agreements to provide for the balancing of rights based on the facts of the case. Given that it is a tool for balancing, the Appellate Body has a degree of freedom in attributing weight to the various concerns of the parties. Factors considered by the Appellate Body in its balancing have included a measure's design, flexibility, rationale and whether it has been exercised in good faith.

⁶ See WTO Appellate Body Report, *EC- Seals*, WT/DS/401, paragraph 5.327

⁷ See https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last checked 15th May, 2015)

Article XX functions as a two-tier test, a sequence that has been deemed by the Appellate Body to be logical and fundamental to the Article.⁸ Interpreting the chapeau without this sequence of investigation has been deemed by the Appellate Body to be difficult “if...possible at all”.⁹ The idea is that the specific exception should be examined first to set the context before turning to the delicate balancing that is to be undertaken under the chapeau. This logic of interpreting the provisions before the chapeau has been disputed and labelled as “arbitrary” by Bartels though he cedes that a two-tier test is appropriate on the grounds of judicial economy.¹⁰

Whether balancing under the chapeau is needed at all has been questioned. Davies believes “the nexus requirements in the heads of provisional justification provide ample protection” against the abuse of Article XX.¹¹ Along this line of thinking, if something is “necessary” to protect life or “related to” the conservation of exhaustible natural resources” it should automatically qualify for an Article XX exemption. The impact of removing the chapeau from Article XX’s two-tier structure would be to restrict the DSB to solely looking at the nature of a measure without regard to discriminatory treatment in place resulting from the measure. The contribution of the two-tier test and interpreting the chapeau to the low success rate of Article XX defences is considered in the next sections.

⁸ See WTO Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, paragraph 119

⁹ Ibid, paragraph 120

¹⁰ Bartels, L, ‘The Chapeau of Article XX GATT: A New Interpretation,’ *Paper No. 40/2014, University of Cambridge Faculty of Law Legal Studies Research Paper Series* (2014) 7

¹¹ Davies, A, ‘Interpreting the Chapeau of GATT Article XX in Light of the ‘New’ Approach in Brazil – Tyres,’ *Journal of World Trade Law* 43(3) (2009) 32

3. The Objective of a Measure and the two-tier test

One ongoing question concerning Article XX and its interpretation is whether the reasons for preliminary justification need to be the same as those provided for satisfying the chapeau. This question as to whether the reason for discriminating has to be the same as the reason for restricting trade was addressed *EC-Seals*.

The “rational connection test” was laid down in *Brazil- Retreaded Tyres*, which provided that the reason for discrimination must bear a rational connection to the objective used for provisional justification and cannot “go against that objective”.¹² This is categorised as an error by Bartels¹³ but supported on the WTO website which tells us: “WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the chapeau. These include...an analysis of the rationale put forward to explain the existence of a discrimination (the rationale for the discrimination needs to have some connection to the stated objective of the measure at issue).”¹⁴

Bartels claims that the rational connection test has been overturned in *EC-Seals*. The Appellate Body found in *EC-Seals* that the objective for discrimination is one of the most important factors but not the sole test for compliance with the chapeau. The Appellate Body’s recognition in *EC-Seals* that the objective for discrimination is not the “sole test” but that there are “additional factors that may also be relevant” is not to overturn the rational connection test. By using the word “additional”, the objective cited under the subparagraph must be considered first. The fact that additional factors may be considered does not forego the need for a rational connection with the objective cited under the subparagraph.

One exception to the EU Seal Regime is for seal products derived from hunts but Inuits or indigenous communities. The assessment of whether the Inuit (IC) Exception supported these communities is seen as evidence that the *Brazil-Retreaded Tyres* dictum is dead. Bartels see it as being “impossible” under it. Far from being impossible, under the *Brazil-Retreaded Tyres* dictum, the protection of traditional hunting methods of indigenous communities can be “rationally connected” to protecting public morals. Protecting traditional methods is part of a broader public morality of upholding ethical standards even if this is not the same specific moral concern that is expressed when banning the importation of seal products. If this rational connection is accepted, the *Brazil-Retreaded Tyres* dictum cannot be said to have been overturned.

Whether or not the rational connection dictum is desirable in the context of the general exceptions is another question. Considering the case in which it was laid down, if a retreaded tyre ban’s objective is to protect the environment, is it unreasonable to say that the discriminatory objective should not run contrary to this environmental objective? While it is difficult to see this logic in the context of tyres, it is perhaps easier to see it in a

¹² See WTO Appellate Body Report *Brazil –Retreaded Tyres*, WT/DS332/AB/R, paragraph 227

¹³ Bartels, L, ‘The Chapeau of Article XX GATT: A New Interpretation,’ Paper No. 40/2014, *University of Cambridge Faculty of Law Legal Studies Research Paper Series* (2014) 15

¹⁴ https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last checked 15th May, 2015)

case like *Shrimp/Turtle*. Conserving sea turtles may be a conservation objective under Article XX(g) but discrimination in this measure's application could be grounded in a moral concern. I.e. the US may give a waiver under XX(a) of this fishing requirement to a small island if this would allow the sustainability of a traditional way of life that would otherwise be unsustainable. While it may be agreed that the justifications under the subparagraphs and chapeau need to be delinked, it is questionable whether *EC-Seals* has actually done this.

The traditional basis for the two-tier test is the distinction between a measure and its application. Bartels claims that *EC- Seals* has abolished this distinction. The Appellate Body cited *Japan-Alcoholic Beverages*, a National Treatment case, in finding that the application of a measure can be discerned from its “design, architecture and revealing structure”.¹⁵ This is an acknowledgement that the chapeau does not exclusively concern the application but also the substantive content of measures as well. Such an interpretation widens the scope for interpreting the application of a measure but whether the distinction between a measure and its application has been abolished is questionable.

The finding that “there could be additional factors that may also be relevant to that overall assessment”¹⁶ further widens the scope for interpretation but it is still pre-emptive to say that the split between a measure and its application has been abolished. In applying the two-tier test, regard is still fundamentally split between the consideration of a measure under the subparagraphs and the application of the measure under the chapeau albeit with a widened interpretation of the term “application”, which can now include additional factors.

The Appellate Body found that in considering the design, architecture and structure of a measure, its “actual or expected application” is relevant in determining whether a measure infringes the chapeau.¹⁷ This is the first time reference to the “expected application” of a measure was referenced in an Appellate Body Report (it was repeated by reference to *EC-Seals* in *China-Rare Earths*, later in 2014).¹⁸ Paragraph 5.302 is a critical paragraph for future interpretations of the chapeau and the implications of each word must be evaluated. Traditionally, a Member does not have to show that damage has actually occurred to satisfy the chapeau and has only needed to show a measure to be discriminatory. As such, the need to introduce the term “expected application” is questionable when damage does not need to be shown. Paragraph 5.302 refers to how a measure is “applied” three times before introducing this distinction between actual and expected application. It is an unnecessary and confusing distinction and the words “actual or expected” add no value to the concept of what constitutes application under the chapeau.

The question of how reference to the “design, architecture and revealing structure” of measures will impact upon compliance with the chapeau will undoubtedly be raised in future cases.

¹⁵ See WTO Appellate Body Report, *EC- Seals*, WT/DS/401, paragraph 5.302

¹⁶ *Ibid*, paragraph 5.321

¹⁷ *Ibid*

¹⁸ See DS431, *China – Measures Related To The Exportation Of Rare Earths, Tungsten, And Molybdenum*, FN625

4. Why measures have failed Article XX

Part 4 looks at the reasons why measures have failed the necessity test or failed to comply with Article XX's chapeau. The success rate for all Article XX claims has been two out of twenty (10%). However, for measures relating to public morals and the environment under Article XX(a), (b) and (g) the success rate is one in six (16.6%).

Before the DSB, an Article XX(a) defence has failed on each of the three occasions it has been invoked. While *China- Audiovisual* failed the necessity test, *US- Gambling* and *EC- Seals* failed to satisfy the chapeau.

In relation to Article XX(b) and (g), since 1995 two defences have failed the necessity test (*China- Rare Earths*, *EC- Tariff Preferences*) and five have failed to comply with the chapeau (*US-Gasoline*, *EC- Tariff Preferences*, *Brazil- Retreaded Tyres*, *US-Shrimp (1998 & 2008)*).

The necessity test was failed because of the availability of alternatives (*China- Audiovisual*), the “piece-meal”¹⁹ manner of its application (*China- Rare Earths*) and the fact that there was no relationship between the objectives stated and the measures put in place (*EC- Tariff Preferences*).

Reasons why measures have been deemed not to comply with Article XX's chapeau have included the application of a prohibition to foreign but not domestic service suppliers (*US- Gambling*), the lack “comparable efforts” in enabling one group to qualify for an exception to a ban (*EC- Seals*) and the existence of an exception to a ban for neighbouring countries which ran contrary to the objective invoked for provisionally justifying the measure (*Brazil- Retreaded Tyres*).

Despite the low success rate of Article XX defences, many measures designed to protect the environment and public morals have been deemed provisionally justifiable, satisfying the first part of the two-tier test. For Article XX claims, 9/20 have been deemed provisionally justifiable (45%). This paper has excluded Article XX(d) from its analysis for thematic reasons. All eight defences under XX(d) have failed the necessity test and in the only case where an analysis of the chapeau was carried out, it was also deemed non-compliant (*US-Thai Cigarettes*). Taking XX(d) out of an analysis of provisional justification, nine out of twelve of the measures defended under XX(a), (b) and (g) have been found to be provisionally justifiable (75%). Whether this represents a silver lining for public policy makers is considered in the next section.

¹⁹ See WTO Appellate Body Report, *China-Rare Earths*, DS431/AB/R, paragraph 5.116

5. Has the right balance been struck?

Part 5 asks whether the right balance has been struck in Article XX's first twenty cases. It considers whether a revised Article XX, or way of interpreting Article XX, is needed given the low success rate for defences. Areas considered include the adequacy of the two-tier test and whether *EC-Seals* has shifted the "line of equilibrium" in interpreting Article XX. In terms of the two-tier test, the necessity test is looked at before turning to the chapeau and whether there is room for improving how it operates.

The view that an appropriate balance had been struck between trade and public policy considerations under the GATT was challenged in the *Tuna/ Dolphin* case. Following the inception of the WTO in 1995, greater weight appeared to be given to environmental concerns in 2001 with the *Shrimp-Turtle* case. This was largely viewed as a positive development but was criticised by Bhagwati claiming the Appellate Body bowed to international environmental pressure.²⁰

In *Shrimp/ Turtle*, it was found that to ensure a measure is compliant with the chapeau, a Member must make efforts to find a cooperative solution to the problem. Secondly, a Member needs to consider the conditions in other territories when designing measures. This finding appeared to strike a greater balance and it seemed that in future cases, measures would be able to comply with these standards. This has not transpired and there has not been a successful Article XX defence since 2001, the year of *US-Shrimp II*.

On the face of it, the low success rate of Article XX defences may indicate a priority being given to market access over concerns such as environmental protection at the DSB. Other reasons that are systemic to the functioning of the DSB may be put forward in explanation. One reason may be that the environmental measures may be acceptable under GATT Article XX by themselves, but their discriminatory application of measures under the chapeau may not be. Thus even if it is a loss for a specific Member in a case, it may be a win for the public policy objective overall.

Other reasons may be that cases involving discriminatory measures are more likely to be resolved at the consultation stage or may not be appealed to the Appellate Body. Furthermore, for diplomatic reasons Members tend to take cases they believe they have a good chance of winning. The paper seeks to analyse Article XX defences once they come before the Appellate Body and does not analyse the steps preceding this.

While successful defences have been uncommon, Article XX(b) and Article XX(g) were successfully defended in *EC-Asbestos* and *US-Shrimp II* respectively. This represents two of the twenty cases where an Article XX exception was invoked and the case went to the Appellate Body. In *US-Shrimp II* discrimination was not found once "similar opportunities" were provided to all exporters. This was the case regardless of the outcome of these negotiating opportunities. In *EC-Asbestos*, this decision rightly affirmed the large degree of discretion Members have when regulating public health issues. This case shows that when it comes to measures concerning a grievous potential harm to the health of Members' citizens and a measure is applied consistently, it has no difficulty being

²⁰ Bhagwati, J, 'After Seattle: Free Trade and the WTO, in Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium,' *Royal Institute of International Affairs Vol. 77* (2001) 15-29

exempted under Article XX.

As seen in Part IV, there has been a 75% success rate for measures under Article XX(a), (b) and (g) in terms of being found to be preliminarily justifiable. This reflects the fact that the Panels and Appellate Body are often willing to deem measures necessary when the aim is to protect life, the environment and public morals. As the Appellate Body stated in their *Korea- Various Measures on Beef* report: "*The more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' the measures designed to achieve those ends.*"²¹

Environmental and public moral defences may often be deemed preliminarily justifiable. Whether this is of any consolation when the balancing of interests under the chapeau has gone against a Member is another question. Perhaps these losses under the environmental and public morals exceptions can be reframed as wins for public policy where it was far from certain whether they would constitute a permissible restriction on trade. Although bans on the importation of seal products and retreaded tyres failed to comply with the chapeau, the fact that such measures have been deemed justifiable restrictions shows that the DSB is willing to allow exceptions for a broad range of moral and environmental measures.

By deeming these import bans provisionally justifiable under WTO law, the Appellate Body has acknowledged a broad range of public policy concerns that permit restrictions on trade. The *Brazil- Retreaded Tyres* case shows the Appellate Body's willingness to accept environmental and health risks as legitimate and complex concerns that can be tackled by a wide range of measures. When a measure infringes Article XX's chapeau on the basis of discriminatory treatment, it is primarily a question of fairness in the accordance of rights equally to all WTO Members than one of favouring trade over public policy interests. A concern of Members in allowing derogations from the WTO Agreements in environmental matters is that these measures will become a new form of protectionism. In enacting environmental or moral measures, ensuring that these measures are not discriminatory in their application should be a starting point for Members in demonstrating that the aim of a measure is environmental rather than protectionist. Showing that a measure is non-discriminatory is a necessary but not sufficient condition for a measure to comply with Article XX.

Seven of the twelve cases brought under Article XX(a), (b) and (g) have failed to comply with the chapeau. Two have complied (*EC-Asbestos* and *US-Shrimp II*), while in three cases the second tier of Article XX's test wasn't reached (*US-Audiovisual*, *China- Rare Earths* and *China- Raw Materials*). Given the difficulty Article XX defences have had in complying with the chapeau, the suitability of its current formulation has been questioned.

To discard the chapeau would be to deprive the Appellate Body of its ability to balance competing rights and to look at the discriminatory effects of measures. Removing the chapeau would render the first twenty years of jurisprudence on Article XX questionable in its applicability to future cases. This is not to mention the uncertainty that would surround

²¹ DS161, *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.

measures previously found incompatible with the chapeau.

A more plausible proposition would be to relax the requirements of the chapeau. Balancing rights under the chapeau is the Appellate Body's job and one of the only feasible ways of doing this would be to allow a broader interpretation of what constitutes application under the chapeau. This may have been partially done in *EC-Seals* where "additional factors" such as the purpose of a measure may now be considered rather than exclusively looking at a measure's application.

In *EC-Seals*, the EU was found not to have made "comparable efforts" to allow Canadian Inuits to qualify for the IC Exception compared to efforts made in relation to Greenlandic Inuits. This aim of this measure was to support hunts for subsistence, an objective different to the one claimed to provisionally justify the measure. To comply with the Regulation, a certificate from a recognised body was necessary which the Appellate Body deemed to constitute arbitrary and unjustifiable discrimination.

The difficulty with taking *EC-Seals* as an example of a progressive interpretation of Article XX's chapeau is that the infringement of the chapeau was less clear-cut here than in other cases. In certifying products that would qualify under the Inuit exception, establishing a recognised body was deemed burdensome as was the "broad discretion" of recognised bodies in deeming products compliant with the Inuit exception.²² If the EU aims at protecting subsistence hunting, the establishment of a body to recognise products as such is reasonable even if "cooperative arrangements" have not been actively pursued.²³

It has been noted that one way for the EU to comply with the chapeau is by removing the Inuit Exception, which would be more trade restrictive and wouldn't necessarily benefit Canada or its Inuit population.²⁴ Removing the Inuit Exception would be to enact a more trade-restrictive measure to comply with the chapeau, which is not the ideal outcome for trade or public policy. If a case were to be made to relax interpretation of the chapeau, *EC-Seals* could be a starting point.

²² See WTO Appellate Body Report, *EC- Seals*, WT/DS/401, paragraph 5.326

²³ Ibid, paragraph 5.337

²⁴ De Gasperi, 'WTO Case Law In 2014,' *Italian Yearbook of International Law* (2015) 17

6. Conclusion

One of the most delicate tasks faced by the Dispute Settlement Body is striking the right balance between enforcing Members' rights under the WTO Agreements and ensuring derogations for public policy objectives can be defended under the General Exceptions. These twenty Article XX cases are a small, but vital sample for policy makers wishing to comply with WTO law.

Compliance with Article XX's chapeau has proved a sticking point in some cases, but applying measures in a discriminatory manner without justification is anathema to the WTO system. The chapeau remains integral in obliging Members to show that environmental or moral measures do not discriminate between Members in an unjustified way. The Appellate Body has shown itself willing to deem Article XX(a), (b) and (g) defences provisionally justifiable in most of its cases and where there is no discrimination, such as in *EC-Asbestos* and *US-Shrimp II*, measures have been found to be compliant.

The success rate for Article XX defences may be low, but it is not the aim of the DSB to achieve a 50% compliance rate. In terms of the cases that have appeared before the Appellate Body, to increase the compliance rate to 50% would require a dismantling of Article XX and its two-tier test. If the chapeau were removed from Article XX, such a compliance rate would be achieved. However this is not desirable as to ignore the way in which the exceptions are applied would be to greatly dilute the substance of the WTO Agreements. Allowing measures to be applied differently to different Members runs contrary to the foundational principles of the WTO.

Measures aiming to protect the environment and public morality can respect WTO law and come under the Article XX exceptions. If the system is to be changed to make it easier for measures to be defended under Article XX, this will come through the DSB, its jurisprudence and the balancing performed by the Appellate Body. If this doesn't develop in a satisfactory manner, change must come multilaterally from the Members themselves, however unlikely this appears to be. This sensitive area involves conflicting values, which are inherent to the WTO system. An attempt to move away from the balancing conducted by the Appellate Body towards a more codified, rules-based approach to deciding the General Exceptions would be counterproductive.

Appendix 1

<u>Cases where Article XX invoked by defendant</u>	<u>Article XX defence rejected by Appellate Body</u>
U.S.—Gasoline (1996)	X
Canada—Periodicals (1997)	X
U.S.—Shrimp I (1998)	X
Korea—Beef (2000)	X
EC—Asbestos (2001)	
U.S.—Shrimp II (2001)	
EC—Tariff Preferences (2004)	X
Canada—Wheat Exports (2004)	X
Dominican Republic—Cigarettes (2005)	X
U.S.—Gambling (2005)	X
Mexico—Soft Drinks (2006)	X
Brazil—Tyres (2007)	X
U.S.—Customs Bond (2008)	X
U.S.—Shrimp .I. (2008)	X
China—Auto Parts (2008)	X
China—Audiovisual Services (2009)	X
Thailand—Cigarettes (2011)	X
China—Raw Materials (2011)	X
EC- Seals (2014)	X
China Rare Earths (2014)	X

The 20 cases considered here constitute a relatively small sample. If Panel Reports which are not appealed to the Appellate Body are included, a similar trend of non-compliance can be observed. In *Tuna-Dolphin* (1991), the Article XX exception was, of course, rejected by the Panel. In *Tuna-Dolphin II* (2012), this case was taken under the Technical Barriers to Trade Agreement.